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No. 90-748

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In the Supreme Court of the United States

OCTOBER TERM, 1990

DAVID JACK VOGT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's racketeering conviction was barred by the statute of limitations.

2. Whether petitioner's conviction for conspiracy to defraud the government (18 U.S.C. 371) should have been reversed because the named co-conspirators were acquitted of that offense.

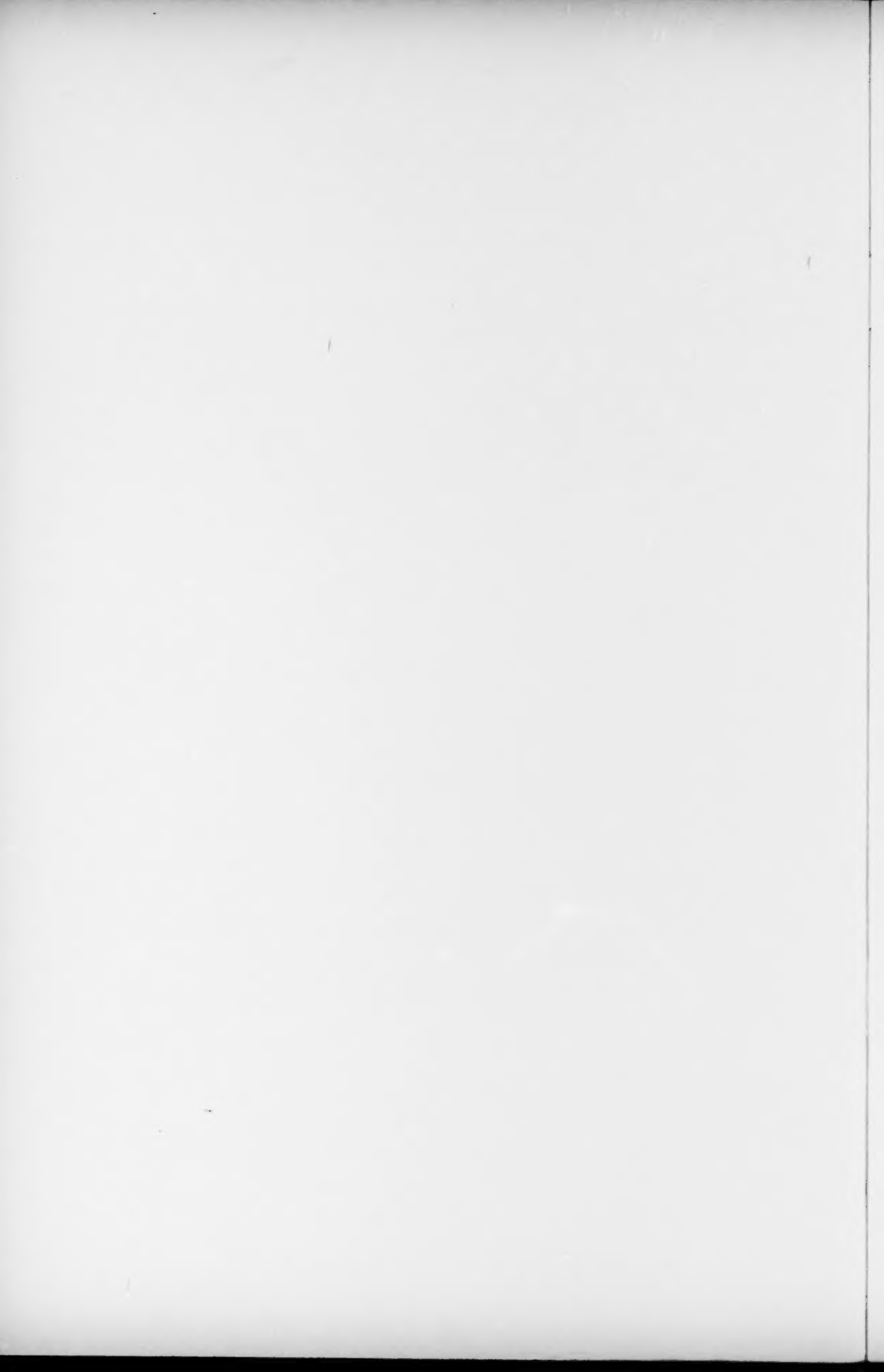


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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 910 F.2d 1184.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1990. A petition for rehearing was denied on August 16, 1990 (Pet. App. 86). The petition for a writ of certiorari was filed on November 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), in violation of 18 U.S.C. 1962(a) (Count 1), and of conspiring to defraud the government, in violation of 18 U.S.C. 371 (Count 3).¹ He was sentenced to 20 years' imprisonment and a \$25,000 fine on Count 1, and to a consecutive five-year term of imprisonment and a \$10,000 fine on Count 3. The court of appeals affirmed. Pet. App. 1-35.

1. Petitioner was a United States Customs Service officer stationed in southern Florida from 1971 to 1979. In May 1974, petitioner arrested Philip Keidaish, III, a member of a drug smuggling ring, on narcotics charges. From late 1976 through late 1978, petitioner received between \$500,000 and \$800,000 from Keidaish in return for Customs Service information that facilitated Keidaish's drug smuggling operation. In early 1979, petitioner retired from the Customs Service. Pet. App. 1-2.

Sometime after their relationship began, petitioner and Keidaish discussed various means of concealing the source of petitioner's illegally obtained money. As a result of these discussions, Keidaish introduced petitioner to Burton Levey, an attorney whose firm had helped Keidaish launder funds generated by his smuggling operations through the use of foreign bank accounts and foreign and domestic corporations.

¹ Petitioner was acquitted of conspiring to violate the RICO statute (Count 2). Co-defendants Burton Levey and William Ray were charged with, and acquitted of, conspiracy to violate the RICO statute and conspiracy to defraud the United States.

Levey assisted petitioner through the same means to conceal the source of his funds and to use those funds and their proceeds for private purposes. Pet. App. 2. Among the other participants in the money laundering scheme was William Ray, a North Carolina attorney. *Id.* at 3.

Under the scheme, petitioner's illegally obtained money was deposited in various foreign bank accounts in the Cayman Islands and the Netherlands Antilles. The money was periodically withdrawn from those accounts and funnelled through trust accounts maintained by Levey's law firm and through five corporations (two of which were foreign, three domestic) that were either formed by or at Levey's direction or were clients of Levey's. The money was used by petitioner for investments, loans, and luxury purchases. Pet. App. 2-3.

2. A superseding indictment against petitioner, Levey, and Ray was returned on January 5, 1987. Count 1 of the indictment charged petitioner with a substantive RICO violation under 18 U.S.C. 1962(a).² Count 2 charged petitioner, Levey, and Ray with conspiracy to violate the RICO statute (18 U.S.C. 1962(d)), and Count 3 charged the same three with conspiracy to defraud the government (18 U.S.C. 371).

² 18 U.S.C. 1962(a) provides in pertinent part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity * * * to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. * * *

The substantive RICO count against petitioner charged that

[f]rom in or about November 1978, up to and including February 25, 1983 * * * [petitioner], having received income derived, directly and indirectly, from a pattern of racketeering activity * * * did knowingly, willfully, and unlawfully use and invest such income and the proceeds of such income, directly and indirectly, in the establishment and operation of the enterprise * * * .

C.A. App. 33-34. The pattern of racketeering activity charged in the indictment was petitioner's receipt of bribe money from Keidaish in violation of 18 U.S.C. 201(c)(3); eight predicate acts of such receipt were alleged to have occurred between December 1976 and August 1978. *Id.* at 34-35. The indictment alleged that the enterprise in which this money was used and invested was the five foreign and domestic corporations; they "functioned as a money laundering operation whereby currency received by [petitioner] from [Keidaish] would be deposited in foreign financial institutions * * *, repatriated into the United States, and invested in properties * * * held in the names of [petitioner] and/or the said corporate entities." *Id.* at 33. The indictment charged specific acts of use and investment of the bribe money and its proceeds for a period extending to February 25, 1983. Pet. App. 18.

After a two-month trial, petitioner was convicted on the substantive RICO and the conspiracy-to-defraud counts, but was acquitted on the RICO conspiracy count. Levey and Ray were acquitted on the two charges against each of them.

3. The court of appeals affirmed. Pet. App. 1-35. The court rejected petitioner's contention that the

prosecution of the substantive RICO count was barred by the statute of limitations.³ The court held that the five-year statute of limitations applicable to the RICO offense with which petitioner was charged, 18 U.S.C. 1962(a), runs from the last act of "use or investment" of illegally derived funds or their proceeds in the "establishment or operation" of an enterprise. In so holding, the court rejected petitioner's argument that the limitations period begins to run from the last predicate act of racketeering charged. The court reasoned that "the conduct proscribed in [Section 1962(a)] is that of using or investing funds, or the proceeds of funds" and that it was appropriate to apply the "triggering rule for criminal prosecutions * * * that the statute of limitations only begins to run from the date of the last act or occurrence required to complete a crime." Pet. App. 20-21. The court held that, because the indictment charged acts of use or investment occurring within five years of the date on which the superseding indictment was returned, the prosecution was not facially time-barred. Pet. App. 18-22. The court further held that there was "abundant evidence" of such acts of use or investment during the limitations period, which justified the jury's conclusion that the prosecution was not time-barred. *Id.* at 22-27.⁴

³ Because RICO does not contain its own statute of limitations, prosecutions under RICO are governed by the general five-year statute of limitations in 18 U.S.C. 3282.

⁴ The court cited three transactions during the limitations period in which petitioner had sold assets that had been purchased with bribe money and titled in one of the five corporations; the proceeds from those sales were deposited into petitioner's foreign bank account or otherwise put to his use. Pet. App. 22-27. The court determined that "[t]hese charging-

The court rejected petitioner's claim that his conviction for conspiring to defraud the United States had to be set aside because his two named co-conspirators were acquitted of that offense. The court determined that there was sufficient evidence of a conspiracy between petitioner and his acquitted co-conspirators to uphold the jury's verdict against petitioner, and that the acquittal of his alleged co-conspirators merely created an issue of jury inconsistency, on which petitioner was entitled to no relief. Pet. App. 34-35.

ARGUMENT

1. Petitioner renews his contention (Pet. 5-11) that his conviction on the substantive RICO count under 18 U.S.C. 1962(a) was barred by the statute of limitations. The court of appeals correctly rejected that contention.

a. Petitioner argues (Pet. 6-8), first, that the prosecution was facially time-barred because the indictment charged a pattern of racketeering that ended more than five years before the indictment was returned. In petitioner's view, the statute of limitations for all substantive RICO offenses, 18 U.S.C. 1962(a)-(c), should run from the date of the last predicate act of racketeering alleged and proved.

The court of appeals correctly held (Pet. App. 19) that petitioner's argument ignores the "critical differences between the conduct separately proscribed" in the different substantive provisions of RICO. As the court explained, it may be appropriate for the

period transactions * * * involved * * * 'use' by [petitioner] of the 'proceeds' of the originally tainted 'income' in the 'operation' of the multi-corporation laundering enterprise." *Id.* at 25.

limitations period to run from the last predicate racketeering act for offenses under Section 1962(c), but that is not appropriate for offenses under Section 1962(a). *Id.* at 19-20 (citing *United States v. Torres Lopez*, 851 F.2d 520, 525 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989); *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); and *United States v. Bethea*, 672 F.2d 407, 419 (5th Cir. 1982)). Subsection (c) of Section 1962 proscribes the "conduct of [an] enterprise's affairs through a pattern of racketeering activity." Thus, the

gravamen of the offense defined in subsection (c) is conduct which by definition is necessarily exactly coincident in time with the continuation of a pattern of racketeering activity. For the specific conduct proscribed is that of conducting an enterprise *through* a pattern of racketeering activity. Once that pattern of activity is ended, the offense under subsection (c) is complete.

Pet. App. 19. Subsection (a) of Section 1962, in contrast, proscribes using or investing funds "derived *from* the pattern of racketeering activity." Pet. App. 20. As the court reasoned:

[s]uch a use or investment obviously need not occur, and here was not charged to have occurred, during the continuation of the pattern of racketeering activity. Unlike the offense defined in subsection (c), therefore, that defined in subsection (a) is not necessarily consummated by the last predicate act of racketeering activity. Instead, it is only consummated by the quite separate act of use or investment, hence the statute with respect to subsection (a) is only triggered by the last such act charged.

Ibid. In so concluding, the court properly applied the traditional rule that the statute of limitations begins to run upon the last act necessary to constitute the crime. Pet. App. 21 (citing *Pendergast v. United States*, 317 U.S. 412, 418 (1943)).

Petitioner does not challenge the court's determination that a violation of Section 1962(a) is complete only upon a "use" or "investment" of racketeering proceeds. Instead, he relies on language in other court of appeals decisions to the effect that RICO "do[es] not create 'new crimes' but serve[s] as the prerequisite[] for the invocation of increased sanctions for conduct which is proscribed elsewhere." Pet. 7 (quoting *United States v. Neapolitan*, 791 F.2d 489, 495 (7th Cir.), cert. denied, 479 U.S. 939 (1986), and citing *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984)). Based on this general proposition, petitioner argues (Pet. 7) that "[s]ince the gravamen of all RICO prosecutions, including those under § 1962(a), is the racketeering acts, the statute of limitations should commence to run from the commission of the last such act alleged and proved."

The court of appeals correctly rejected this argument, noting that it rests on the erroneous premise that "nothing except the predicate acts of racketeering activity * * * are to be considered as essential elements of the specific crimes defined in subsections (a)-(c), and that all other seeming elements may therefore be simply disregarded in assessing for triggering (or guilt?) purposes when the crimes defined in these subsections have been committed." Pet. App. 20-21 & n.3. As the court concluded, petitioner's reliance on broad judicial statements regarding RICO "seeks to make more of the * * * generalizations than they will bear." *Ibid.*

Contrary to petitioner's assertion (Pet. 8), the court did not ignore the desirability of uniformity in the application of the statute of limitations to substantive RICO violations. Instead, the court determined that "[t]he virtue of uniformity * * * cannot in the end override statutory text which simply prevents it." Pet. App. 21. The court correctly noted that a prosecution under Section 1962(a) "could not proceed until * * * use or investment [of tainted income] had occurred, without regard to when the pattern of racketeering activity which produced the tainted income may have come to an end." *Id.* at 21-22.⁵ As the court recognized, to hold that the limitations period under Section 1962(a) commences before a prosecution could be initiated under that provision would contravene settled principles of determining the triggering event for criminal prosecutions. See *Toussie v. United States*, 397 U.S. 112, 115 (1970); *Pendergast v. United States*, 317 U.S.

⁵ Petitioner's reliance (Pet. 8) on *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987), is misplaced. There, the Court held that the four-year statute of limitations applicable to civil actions under the Clayton Act, 15 U.S.C. 15b, applies to civil actions under RICO. 483 U.S. at 146-147. The Court looked to federal rather than state statutes of limitations in part because of the desirability of having a uniform limitations period for civil RICO actions. *Id.* at 153-154. The Court did not suggest that a similar principle should apply in construing the statute of limitations applicable to criminal prosecutions under RICO. On the contrary, the Court expressly refused to analogize civil RICO actions to criminal RICO actions. *Id.* at 156. Moreover, the Court made clear that the issue before it—what limitations period to apply—was distinct from the issue of when the limitations period begins to run. *Id.* at 156-157. *Agency Holding Corp.* is therefore wholly inapposite here.

412, 418 (1943); *United States v. Irvine*, 98 U.S. 450, 452 (1879).

b. Petitioner further contends (Pet. 9-11) that, even if the statute of limitations for violations of Section 1962(a) runs from the last "use" or "investment" of racketeering proceeds, the prosecution in this case was time-barred because the government failed to prove that any "use" or "investment" occurred within the charging period, *i.e.*, after January 5, 1982.

The court of appeals correctly rejected this argument, based on "abundant evidence" (Pet. App. 24) that petitioner engaged in "use[s]" or "investment[s]" of racketeering proceeds after that date. The court cited three examples of such transactions, each of which involved the sale of an asset that petitioner had acquired with bribe money from Keidaish and had titled in one of the five laundering corporations. *Id.* at 25. The court concluded that each of those transactions "constituted a 'use' by [petitioner] of [tainted] funds or their proceeds in the 'operation' of the enterprise in its intended function, which was precisely to serve as a concealing conduit or repository of the funds or assets." *Id.* at 25-26.

Here, as below, petitioner makes only a narrow challenge to the adequacy of these transactions in establishing the timeliness of the prosecution. He does not challenge the court of appeals' holding that these transactions "were effected directly by or in behalf of [petitioner] * * *; that in these transactions the corporations were simply used as dummies or *alter egos* of [petitioner] specifically to conceal the source of his tainted funds; and that the funds and assets involved * * * were, at least in part, either income or the proceeds of income derived from the 1976-78 pattern of racketeering activity." Pet.

App. 24-25. Instead, petitioner asserts (Pet. 11) that these transactions did not involve the "operation" of the money laundering enterprise because he undertook them in contemplation of dismantling the enterprise.

This assertion is meritless. As the court of appeals recognized (Pet. App. 26 n.7), the "operation" of the enterprise consisted of its use as a "repository or conduit for tainted funds in order to conceal their ultimate source and beneficial ownership." The tainted funds or their proceeds were thus "use[d]" in the "operation" each time petitioner caused them to be "run into or out of one of the enterprise corporations." *Id.* at 25. It is irrelevant that in doing so petitioner may have contemplated ceasing operation of the enterprise.

2. Petitioner challenges (Pet. 11-13) his conviction on the conspiracy-to-defraud count on the ground that it is inconsistent with the acquittal of his co-defendants on this count. The court of appeals correctly rejected this challenge upon determining that "sufficient evidence exist[ed] of a conspiracy between [petitioner] and his acquitted co-conspirators to uphold the jury's verdict against [petitioner]." Pet. App. 35.

The court's approach reflects the established principle that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." *Harris v. Rivera*, 454 U.S. 339, 345 (1981). That principle was first enunciated in *Dunn v. United States*, 284 U.S. 390, 393-394 (1932), and has "stood without exception in this Court for 53 years." *United States v. Powell*, 469 U.S. 57, 69 (1984). See also *Standefer v. United States*, 447 U.S. 10, 22-25 (1980); *United States v. Dotterweich*, 320 U.S. 277, 279 (1943). The *Dunn* rule has been applied by the Court "with respect to

inconsistency between verdicts on separate charges against one defendant * * * and also with respect to verdicts that treat codefendants in a joint trial inconsistently." *Harris*, 454 U.S. at 345. The rule is founded on the recognition that an acquittal may result, not from a failure of proof, but from "mistake, compromise, or lenity." *Powell*, 469 U.S. at 65; see also *Dunn*, 284 U.S. at 393.

The rule of *Dunn* applies with full force in the conspiracy context. It would be "pure speculation" (*Powell*, 469 U.S. at 66) to assume that the jury's acquittal of a defendant's alleged co-conspirators signifies a conclusion that no conspiracy existed. Such speculation is in any event unnecessary. "[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Id.* at 67.

Since this Court's decision in *Powell*, every court of appeals that has squarely considered whether the *Dunn* rule extends to conspiracy verdicts has held that it does. Pet. App. 34-35; *United States v. Bucuvalas*, 909 F.2d 593 (1st Cir. 1990); *United States v. Thomas*, 900 F.2d 37, 40 (4th Cir. 1990); *United States v. Valles-Valencia*, 823 F.2d 381, 382, amending 811 F.2d 1232 (9th Cir. 1987). Other courts, citing this Court's decision in *Powell*, have expressed grave doubts about the continuing validity of any exception to the inconsistent-verdict rule for conspiracy cases. See, e.g., *United States v. Mancari*, 875 F.2d 103, 104-105 (7th Cir. 1989); *United States v. Dakins*, 872 F.2d 1061, 1065-1066 (D.C. Cir.), cert. denied, 110 S. Ct. 410 (1989); *Government of the Virgin Islands v. Hoheb*, 777 F.2d 138, 142 n.6 (3d Cir. 1985); *id.* at 142-143 (Garth, J., concurring).

Contrary to petitioner's suggestion (Pet. 13), those decisions and the decision of the court below do not conflict with *Hartzel v. United States*, 322 U.S. 680 (1944). *Hartzel* did not involve an inconsistent verdict; the jury returned guilty verdicts against both the defendant and his two alleged co-conspirators. *Id.* at 682 n.3. The Court set aside the defendant's conspiracy conviction because the verdicts against his co-defendants had been set aside by the lower courts on grounds of insufficient evidence. *Ibid.* The Court apparently concluded, based on the lower court rulings, that the evidence was insufficient to show that any conspiracy existed. Although the Court's one-sentence, footnote discussion of the issue is somewhat ambiguous, it appears that the Court's ruling was based on the insufficiency of the evidence against the defendant rather than the formal disposition of the convictions of the defendant's two alleged co-conspirators. Accord *Morrison v. California*, 291 U.S. 82, 93 (1934); *Gebarde v. United States*, 287 U.S. 112, 123 (1932). In any event, because *Hartzel* did not involve a conspiracy conviction that was challenged on the basis of an inconsistent verdict, petitioner's reliance on that decision is misplaced. See *United States v. Bucuvalas*, 909 F.2d at 596 (*Hartzel* did not involve inconsistent jury verdicts, but rather the reversal on appeal of all the co-defendants' conspiracy convictions due to insufficient evidence).

Petitioner's reliance on lower court decisions is likewise misplaced. In two of those decisions, the court expressly refused to decide whether the *Dunn* rule applied in the conspiracy context, because it was unnecessary to do so; in each case, the evidence showed that the defendant conspired with individuals other than his acquitted co-defendants. See *United States*

v. *Suntar Roofing, Inc.*, 897 F.2d 469, 475-477 (10th Cir. 1990); *United States v. Howard*, 751 F.2d 336, 338 (10th Cir. 1984), cert. denied, 472 U.S. 1030 (1985).

The third decision on which petitioner relies is no longer good law. In *Romontio v. United States*, 400 F.2d 618, 619 (10th Cir. 1968), cert. dismissed, 402 U.S. 903 (1971), the court reversed Romontio's conspiracy conviction because one of Romontio's co-conspirators had been acquitted in an earlier trial and the remaining co-conspirators were acquitted in Romontio's trial. Subsequently, in *Standefor v. United States*, *supra*, this Court held that a defendant accused of aiding and abetting the commission of a federal offense could be convicted despite the prior acquittal of the alleged principal. 447 U.S. at 21-25. That holding was based on the recognition that in the earlier trial the jury may have acquitted the co-defendant out of compassion or compromise. *Id.* at 22-23. Accordingly, the co-defendant's culpability could be relitigated in the later trial to determine the defendant's guilt. *Id.* at 26. Thus, if *Romontio* had arisen after *Standefor*, the government could have relitigated in Romontio's trial the culpability of the earlier acquitted co-conspirator. Under *Standefor*, the acquittal of Romontio's co-conspirator in the first trial therefore would not have barred Romontio's conviction in the second trial. In this respect, *Standefor* in effect overruled *Romontio*. See *United States v. Espinosa-Cerpa*, 630 F.2d 328, 331-333 (5th Cir. 1980) (relying on *Standefor* and *Dunn* to hold that acquittal of co-defendants in earlier trial did not require reversal of defendant's conspiracy conviction).

The only decision that directly supports petitioner's position is *Herman v. United States*, 289 F.2d 362

(5th Cir.), cert. denied, 368 U.S. 897 (1961). In *Herman*, the Fifth Circuit held that where all but one of the charged co-conspirators are acquitted in a single trial, "the verdict against the one will not stand." 289 F.2d at 368. Yet *Herman*'s continuing validity is dubious. The Eleventh Circuit sitting en banc expressly overruled it in light of *Powell*. *United States v. Andrews*, 850 F.2d 1557 (11th Cir. 1988), cert. denied, 488 U.S. 1032 (1989).⁶ And while the Fifth Circuit has not had to confront directly the question whether *Herman* remains good law, that court has criticized *Herman* in several recent decisions. See *United States v. Villasenor*, 894 F.2d 1422, 1428 n.6 (1990) (stating that the holding in *Herman* regarding acquittal of co-conspirators "is of highly questionable validity" in light of *Powell*, but finding *Herman* inapposite in case before the court); *United States v. Davila*, 698 F.2d 715, 720 (1983) (same); *United States v. Albert*, 675 F.2d 712, 713 (1982) (same); *United States v. Espinosa-Cerpa*, 630 F.2d 328, 331-333 (1980) (same). It is therefore unlikely that the Fifth Circuit will adhere to *Herman* when the court is squarely confronted with the issue presented here. In light of the clear trend of the decisions against petitioner's position since this Court's decision in *Powell*, review of this issue is not likely to be necessary unless some court breaks with the trend and expressly adheres to the *Herman* doctrine.

⁶ In *Bonner v. City of Pritchard*, 661 F.2d 1206 (1981) (en banc), the Eleventh Circuit adopted as precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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